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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 604

VAN A. STILLEY, *Petitioner*

v.

THE UNITED STATES, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No.

VAN A. STILLEY, *Petitioner*

v.

THE UNITED STATES, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

Byron N. Scott, attorney for Van A. Stilley, Esq., petitioner herein, respectfully requests in his behalf that the Supreme Court of the United States grant this petition for a writ of certiorari to review the decision of the United States Court of Claims in the above entitled case.

ORDER DELIVERED IN THE COURT BELOW TO BE REVIEWED

The order without opinion to be reviewed was delivered in the United States Court of Claims, No. 419-66, decided April 5, 1968, and is set out *infra* in the Appendix A hereto at page 9. Petitioner's motion for reconsideration of that order was denied on July 17, 1968.

JURISDICTION

As grounds on which to invoke jurisdiction of this Court, petitioner relies upon Title 28, U. S. Code, Section 1255, and alleges and verily believes that the special and important reason justifying a grant of review on writ of certiorari in the sound judicial discretion of this Court within the meaning of Rule 19 of the Rules of this Court is that the order of the court below decides an important question of federal law which has not been, but should be settled by this Court.

QUESTIONS PRESENTED FOR REVIEW

1. Whether to discharge a probationary federal employee, who is an attorney, for alleged falsification of answers on a pre-employment questionnaire, without a hearing and in violation of agency rules, while misrepresenting and concealing evidence which would have sustained his denial of the charge, stamps him with such a "stigma" as to be a denial of his Constitutional right to due process.

2. Whether a U. S. District Court's dismissal of a complaint for lack of jurisdiction thereby collaterally estops the plaintiff therein to bring an action on the same facts in the U. S. Court of Claims.

CONSTITUTIONAL PROVISION INVOLVED

Amendment 5

> "No person shall be . . . deprived of life, liberty or property without due process of law . . ."

REGULATIONS INVOLVED

The Rules of Conduct for Internal Revenue Service Employees provide as follows:

> § 1942.55, Rules of Conduct for Internal Revenue Service Employees. (effective January 1, 1963)

False Statements

Proper functioning of the Revenue Service requires that the Service, the Courts, other Federal agencies and the public be able to rely implicitly on the truthfulness of Revenue Service employees in matters of official interest. An employee may be subjected to severe disciplinary action and prosecution for intentionally making false or misleading verbal or written statements in matters of official interest. Some of these matters of official interest are: transactions with taxpayers, other Federal agencies or fellow employees; entries on tax returns, work reports of any nature or accounts of any kind; vouchers, leave requests, application forms SF-57, and other forms which serve as a basis for appointment, reassignment, promotion, or other personnel actions; and affidavits, transcripts of testimony, or statements to Inspection, whether or not under oath.

CIVIL SERVICE COMMISSION REGULATIONS

5 CFR 315.804 *Termination of probationers for unsatisfactory performance or conduct.*

When an agency decides to terminate an employee serving a probationary or trial period because his work performance or conduct during this period fails to demonstrate his fitness or his qualifications for continued employment, it shall terminate his services by notifying him in writing as to why he is being separated and the effective date of the action. The information in the notice as to why the employee is being terminated shall, as a minimum, consist of the agency's conclusions as to the inadequacies of his performance or conduct.

5 CFR 315.805 *Termination of probationers for conditions arising before appointment.*

When an agency proposes to terminate an employee serving a probationary or trial period for reasons based in whole or in part on conditions aris-

ing before his appointment, the employee is entitled to the following:

(a) *Notice of proposed adverse action.*

The employee is entitled to an advance written notice stating the reasons, specifically and in detail, for the proposed action.

(b) *Employee's answer.* The employee is entitled to a reasonable time for filing a written answer to the notice of proposed adverse action and for furnishing affidavits in support of his answer. If the employee answers, the agency shall consider the answer in reaching its decision.

(c) *Notice of adverse decision.* The employee is entitled to be notified of the agency's decision at the earliest practicable date. The agency shall deliver the decision to the employee at or before the time the action will be made effective. The notice shall be in writing, inform the employee of the reasons for the action, inform the employee of his right of appeal to the appropriate office of the Commission, and inform him of the time limit within which the appeal must be submitted as provided in § 315.806(d).

5 CFR 315.806 *Appeal rights to the Commission.*

(a) *Right of appeal.* An employee is entitled to appeal to the Commission in writing from the agency's decision to terminate him under § 315.804 or § 315.805 only as provided in this section. The Commission's review does not include any matter except as provided in paragraphs (b) and (c) of this section.

(b) *On discrimination.* An employee whose termination is subject to the provisions of § 315.804 or § 315.805 may appeal on the ground that the action taken was based on political reasons not required by statute, or resulted from discrimination because of sex or marital status, or from improper discrimination because of physical handicap. When an appeal is based on any of these grounds, the appellant shall submit an affidavit setting forth the facts and circumstances on which the appeal is based.

(c) *On improper procedure.* A probationer whose termination is subject to § 315.805 may appeal on the ground that his termination was not effected in accordance with the procedural requirements of that section.

STATEMENT

On June 26, 1964, the 362nd day of his probationary year, petitioner, an attorney, was fired from his position with the Internal Revenue Service for having falsified his negative answers to two pre-employment questionnaire items concerning his mental health history. The notice of proposed separation, citing a U. S. Navy medical report, stated that petitioner had been treated for a mental condition. Petitioner denied the charge. He asked to see the report, which he had not known existed, and requested a hearing. Both requests were denied and the firing was sustained.

The medical report, in fact, reveals that petitioner was not treated for anything. It corroborates petitioner's prior explanation that he had been examined and observed by a psychiatrist while in the Navy in 1951-52, but that he was not treated, not told that he was treated, and not told that he needed treatment. Other than for that experience petitioner has never been seen professionally by any psychiatrist. His questionnaire answers were and are true, and he neither misled nor intended to mislead anyone. He is now a member of the Bar of this Court, practicing law to the extent this disgrace permits.

The IRS misrepresented and concealed the medical report from petitioner and misrepresented and concealed both the medical report and the questionnaire forms from the Civil Service Commission when petitioner appealed there. The IRS sent its "file" of the case to the CSC, where both its regional office and later its Board of Appeals and Review considered the matter and acted adversely to petitioner without ever having seen the documents on which the charge was based, without petitioner's knowing or being able to

find out that the documents had been misrepresented and were being concealed, and without questioning the absence from the file of the documents most basic to the charge.

The medical report finally was brought to light through the efforts of petitioner's Congressman. Petitioner had already appealed to the CSC Board of Appeals and Review, mistakenly assuming that it had and would consider the documents on which the charge was based and which petitioner had not been allowed to see. When that body sustained the agency action, petitioner then sought a reconsideration based upon his discovery that he had been deceived by the IRS, that the specification to the charge was erroneous in fact, misrepresented the medical report, claimed support by a medical report which in fact did not corroborate but refuted it, and that there had been neither a charge nor a finding of intent to falsify when by its own rules falsification is not misconduct unless intentional. The CSC Board of Appeals and Review declined to reopen the case.

Petitioner then brought suit in the U. S. District Court for the District of Columbia. His complaint was dismissed on countermotions for summary judgment for lack of jurisdiction beyond two points which were considered and decided: (1) Petitioner had failed to exhaust his administrative remedies, presumably for having failed to present to the CSC that which the IRS was concealing from him, and (2) the "reason . . . [was] . . . reasonable on its face." See Appendix B, page 10. The U.S. District Judge refused to admit, hear, or consider anything touching the merits of the case. His decision was affirmed without opinion by the U.S. Court of Appeals for the D.C. Circuit.

In a further effort to exhaust his administrative remedies petitioner then appealed to the Civil Service Commissioners, presenting the material previously concealed by the IRS. The Commissioners declined to reopen the case.

Then, surely having exhausted his administrative remedies and being bound by the District Court's affirmed ruling that

it did not have jurisdiction, petitioner brought an action in the U. S. Court of Claims. On April 5, 1968, that court ruled without opinion that petitioner's claim was barred by collateral estoppel, pointing out in its order that "If [petitioner] had brought his suit in the first instance before [the Court of Claims], the court would, on the showing made to [it], have determined that a trial was required before a proper disposition could be had." See Appendix A, page 9.

Petitioner's motion for a rehearing in the Court of Claims was denied on July 17, 1968. Petitioner still has never been heard on the merits in any fact-finding forum.

REASONS FOR GRANTING THE WRIT

Petitioner relies upon the reasons advanced by Mr. Justice Thurgood Marshall when, as Solicitor General of the United States, he filed a memorandum in support of the petition for certiorari in this Court in the remarkably similar case of *Sylvia Bennett v. United States,* 174 Ct. Cl. 492 (1966); *vacated and remanded,* 385 U.S. 4 (1966). That memorandum for the United States, joining forces with the petitioner in that case, is included herein at Appendix C, page 12.

Petitioner also relies upon a recognition of the failure of our due process of law that resulted in his position caught between two irreconcilable federal court findings: One court refused to hear him on the issues; the other has found that the first decided the issues. Neither court has acted with respect to the merits of the case and petitioner with the "stigma" of a lawyer fired for lying to the Treasury Department is now out of court with never an avenue of redress. This violates his constitutional right to procedural due process, and the spirit both of the Constitution and of the Federal Rules of Civil and Appellate Procedure.

CONCLUSION

Wherefore the premises considered, petitioner believes there are special and important reasons justifying grant of a writ of certiorari in his case.

Respectfully submitted,

Byron N. Scott
Attorney for Petitioner

APPENDIX A

IN THE UNITED STATES COURT OF CLAIMS

No. 419-66

VAN A. STILLEY, III

v.

THE UNITED STATES

Before COWEN, Chief Judge, LARAMORE, DURFEE, DAVIS, COLLINS, SKELTON and NICHOLS, Judges.

O R D E R

This case comes before the court on defendant's motion and plaintiff's counter motion for summary judgment, having been considered together with the opposition thereto, the briefs of the parties and oral argument of counsel.

If plaintiff had brought his suit in the first instance before this court, the court would, on the showing made to us, have determined that a trial was required before a proper disposition could be had. But plaintiff elected to bring suit in the District Court (*Stilley v. Cohen*, D.D.C. Civil Action No. 2867-64) and that court denied plaintiff's motion for summary judgment, granted the defendant's motion to dismiss the complaint and dismissed the action. The United States Court of Appeals for the District of Columbia Circuit affirmed by order C.A. D.C. No. 19,984). On consideration of the record before those courts, the arguments presented to them, and their orders, we conclude that all the material issues which plaintiff seeks to raise in the present suit have already been determined in the prior action and therefore that plaintiff's claim in this court is barred by collateral estoppel. See *Edgar v. United States*, 145 Ct. Cl. 9, 171 F. Supp. 243 (1959). *Larsen v. United States*, 145 Ct. Cl.

178, 170 F. Supp. 806 (1959); *Green v. United States*, 145 Ct. Cl. 628, 172 F. Supp. 679 (1959).

IT IS THEREFORE ORDERED that defendant's said motion for summary judgment be and the same is granted, plaintiff's counter motion for summary judgment is denied, and plaintiff's petition is dismissed.

BY THE COURT

[APR - 5 1968]

Wilson Cowen
Chief Judge

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

VAN ALBERT STILLEY, III,

Plaintiff,

v.

Civil Action
No. 2867-64

SHELDON S. COHEN, Commissioner,
Internal Revenue Service

Defendant.

O R D E R

This cause having come before the Court on defendant's motion to dismiss and alternative motion for summary judgment and plaintiff's cross-motion for summary judgment, and upon consideration of these motions, the memoranda of points and authorities and exhibits in support thereof and in opposition thereto, and argument of counsel, and it appearing to the Court that plaintiff was a probationary employee, and it further appearing:

1. That the reason for plaintiff's discharge is reasonable on its face and sufficiently precise as a matter of law;

2. That plaintiff is barred by the exhaustion of administrative remedy doctrine from raising any claim of procedural irregularity in this Court which was not raised before the Civil Service Commission, and which in any event is insubstantial;

3. That this Court lacks jurisdiction to conduct judicial review beyond these two points,

It is by the Court this 17th day of December, 1965,

ORDERED that defendant's motion to dismiss be and it hereby is granted and that the action be and it hereby is dismissed, and it is further

ORDERED that plaintiff's motion for summary judgment be and it hereby is denied.

H. F. Corcoran
United States District Judge

[Certificate of Service Omitted in Printing]

APPENDIX C

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 143

SYLVIA BENNETT, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES

STATEMENT

On February 25, 1963, petitioner received a career appointment, subject to a one year probationary period, as a clerk-typist employed by the Inspector of Naval Materiel, Newark, New Jersey. As part of her application for employment, petitioner completed Standard Form 85, entitled "Security Investigation Data For Non-Sensitive Position." Question 8 required applicants to list "organizations with which affiliated (past and present) other than religious or

political organizations * * *." Petitioner answered "None." (Pet. App. 1a).

A security investigation of petitioner, completed after she commenced work, indicated that, in fact, in 1950 and 1951 she had been a member of the International Workers Order, an organization included in the Attorney General's list of subversive organizations (See *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123; see, also, 182 F.2d 368 (C.A. D.C.)). Thereafter, on June 21, 1963, petitioner was notified by the Supervising Inspector of Naval Materiel for the district in which she was employed that it was proposed to separate her from her position. The reasons given in this notice for the separation were as follows (Pet. App. 1a-2a):

> You are charged with deliberate falsification of appointment papers in that you did not acknowledge membership in the International Workers Order. Information made available to this activity indicates that you were a member of this organization from 12 February 1950 until March 1951. Your certificate number as a member of Local 517 JA was 418008. Standard Form 85 which you completed on 25 February 1963 reflected the answer of "None" to Question 8, "Organizations with which affiliated (past and present) other than religious or political organizations or those which show religious or political affiliations". Your omission of this essential information is considered to be a serious action as your signature on the SF 85 was preceded by the certification that "I certify that the above statements are true, complete, and correct to the best of my knowledge and belief, and are made in

good faith". This certification admonishes that a false statement on the form is punishable by law.

Petitioner was also informed by the June 21 notice that she could reply to the charge contained in it. On June 25, 1963, she submitted a written reply denying the charge that she had been a member of the International Workers Order, asserting that her answer to Question 8 had been truthful, and declaring further that during the period in question she had spent most of her time seeking medical treatment for a kidney infection. (Pet. App. 2a, 4a, 12a). On June 27, the Supervising Inspector replied that petitioner's letter did not controvert the information available to his office concerning her past membership in the International Workers Order and that petitioner was therefore to be separated from her position on July 5, 1963. Petitioner thereafter retained a lawyer who, on July 2, 1963, wrote to the Inspector reaffirming her denial of the charge and requesting that petitioner's "summary dismissal * * * be rescinded, and held in abeyance pending a Hearing on said charges." The letter referred to "[t]he stigma of a dismissal predicated upon * * * charges" of "deliberate falsification, etc., and alleged membership in a subversive organization" and suggested "the possibility of mistaken names." (Pet. App. 2a, 4a-5a, 13a). This request for a hearing was denied, and petitioner was removed from her employment on July 5, 1963. Petitioner's appeals to the Secretary of the Navy and the Civil Service Commission were denied on August 8 and 9, 1963. (Pet. App. 2a).

The present action for loss of pay was commenced in the Court of Claims on July 1, 1964. Petitioner alleged that her discharge had been unlawful (1) because the advance notice and final decision of the agency had failed to set forth all the facts needed to enable plaintiff to understand the reason for the proposed action and to join issue therewith, and (2) because of the failure to afford her a hearing prior to the effectuation of her discharge. Both petitioner and the United States moved for summary judgment. The Court of Claims, Judge Davis dissenting, granted the United States' motion, denied petitioner's cross-motion, and dismissed petitioner's petition (Pet. App. 8a).

At the outset, the court recognized "that a stigma attaches to a dismissal for alleged membership in a subversive organization" (Pet. App. 8a). It also recognized that the Navy's applicable regulations (Navy Civilian Personnel Instruction 352, 4-8c), drafted pursuant to the Civil Service Commission's regulations (5 C.F.R. 2.301(c)(2) and 5 C.F.R. 22.302(a) (1963 Supp.)), required that, where a probationary employee was to be separated for "pre-appointment" conditions, the employee be given "specific and detailed reasons," including "all the facts needed to enable him to understand the reasons for the proposed action and to join issue with it." * The court held, however, that these requirements had been fully

* The applicable regulations are set forth in full in the Appendix to this memorandum, *infra*, pp. 8-9. At the time of her separation, petitioner, a probationary or trial employee, was not in the classified civil service. She was, therefore, not covered by 5 U.S.C. 652.

complied with in the June 21, 1963, notice sent to petitioner (Pet. App. 4a-5a). Finally, the court rejected petitioner's argument that the applicable regulations required the Navy to afford hearings to all probationary employees separated for pre-appointment reasons (Pet. App. 6a-7a).

In his dissent (Pet. App. 8a-16a), Judge Davis agreed with the court's rejection of petitioner's general claim that the applicable regulations required a hearing to be afforded to all probationary employees charged with pre-appointment misconduct (Pet. App. 16a). In Judge Davis' view, however, the Navy had not complied with its own regulations concerning notice of charges before discharge in petitioner's case. Specifically, Judge Davis believed that, in view of the security implications of the discharge, "plaintiff should have received some better statement" "as to the location of the 'local,' the person or persons said to have provided the information to the Government, any documentary backing for the charge (such as an IWO membership list, a membership card in plaintiff's writing or name, or a prior admission by her of membership), the nature of her purported membership, or the like. * * * [I]f we presuppose her innocence—as we must when we pass on the validity of the charge—it is hard to see how she could 'join issue' with so general an indictment, except by the futile gesture of offering a wholesale denial, as she did" (Pet. App. 11a-12a). Judge Davis believed that petitioner had adequately raised this point by requesting a hearing while stating that the charge was wholly untrue and mistaken.

DISCUSSION

In this Court, petitioner does not urge that she had a right to a hearing before discharge, but relies entirely upon Judge Davis' views in the Court of Claims regarding the adequacy of the information afforded petitioner prior to her discharge (Pet. 4). We construe the applicable regulation—requiring "specific and detailed reasons" including "all the facts needed to enable" the employee "to join issue with" the proposed discharge—as indicating that the government should, where possible, provide sufficient information to afford the employee the opportunity to rebut the case against him. See *Greene* v. *McElroy*, 360 U.S. 474, 496. In light of the suggestion in the dissenting opinion that the notice given to petitioner of the reasons for her discharge might not, in fact, have afforded her this opportunity in this case, the Solicitor General has reviewed the administrative file in order to determine whether additional information could have been provided for this purpose. This review has revealed that the evidence upon which the charge against petitioner was based—evidence which was entirely documentary in nature—could have been shown to petitioner, and would unquestionably have afforded her a full opportunity to attempt to rebut the specific basis for the charge against her. While the United States argued in the Court of Claims that the relatively detailed information which was, in fact, given to petitioner afforded an adequate basis for rebuttal of the charge—especially in the absence of a specific request by petitioner for further information—we do

not disagree with Judge Davis' view that the additional documentary evidence upon which the charge was actually based should have been made available to petitioner in order to remove any doubt as to her ability to meet the charges against her with more specificity than the submission of a general denial. We also agree that petitioner adequately stated and preserved this objection in the circumstances. We therefore acknowledge that petitioner's separation from employment was invalidly consummated and respectfully suggest that the petition for a writ of certiorari be granted, the judgment of the Court of Claims vacated, and the case remanded to that court for further proceedings.

THURGOOD MARSHALL,
Solicitor General.

August 1966

APPENDIX

REGULATIONS INVOLVED

1. 5 C.F.R. 2.301(c)(2) (1963 Supp.) provides:

If an agency decides to terminate an employee during the probationary or trial period for reasons based in whole or in part on conditions arising before his appointment, the action shall be processed in the same manner as actions taken under Subpart C of Part 22 of this Chapter and the employee shall have the right of appeal provided in § 22.304 of that subpart.

5 C.F.R. 22.302(a) (1963 Supp.) provides:

Notice of proposed adverse action. An employee against whom adverse action is sought shall be given advance written notice stating the reasons, specifically and in detail, for the proposed action.

2. Navy Civilian Personnel Instruction 352, 4-8c. (1)-(2) (22 June 1962) provides:

Procedure when separation is proposed for reasons based on conditions that existed before appointment ("pre-appointment" conditions, subparagraph 4-8a (2) above.)

(1) In this situation the probationer is entitled to:

(a) Five days' advance written notice of action proposed and proposed effective date.
(b) Specific and detailed reasons
(c) Right to reply and to consideration of reply
(d) Final decision
(e) Appeal to the Civil Service Commission (procedure only)

(2) Note particularly that when proposed Separation-Disqualification is based on pre-appointment reasons, the probationer is entitled to specific and detailed reasons, i.e., all the facts needed to enable him to understand the reasons for the proposed action and to join issue with it.

* * * *

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In the Supreme Court of the United States

OCTOBER TERM, 1968

VAN A. STILLEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 604

VAN A. STILLEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The order of the Court of Claims (Pet. App. A) is not reported. The order of the United States District Court for the District of Columbia dismissing petitioner's complaint in a prior, related action (Pet. App. B) is not reported.

JURISDICTION

The judgment of the Court of Claims was entered on April 5, 1968 (Pet. App. A). Petitioner's motion for reconsideration was denied on July 17, 1968. The petition for a writ of certiorari was filed on October 4, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1255.

QUESTIONS PRESENTED

1. Whether petitioner's action for back pay was barred, under the doctrine of *res judicata*, by a final judgment of a district court dismissing his prior suit for reinstatement.

2. Whether the procedures by which petitioner was discharged as a probationary employee were in accordance with applicable Civil Service regulations.

STATEMENT

On June 12, 1964, petitioner, a probationary employee of the Internal Revenue Service, was notified in writing of his proposed separation from the Service for having falsified his appointment documents, in violation of Section 1942.55 of the Rules of Conduct for Internal Revenue Service Employees.[1] The specification of charges stated that petitioner had answered negatively the following two questions in an employment questionnaire (G. Ex. 1, p. 4):

> Have you ever had either a nervous condition, nervous breakdown, or mental illness?
>
> Have you ever been treated, hospitalized or advised that you were treated for either a nervous, mental, or psychiatric condition?

The specification stated that petitioner's answers were contradicted by a medical report, dated December 19,

[1] Section 1942.55 (Pet. 2–3) provides in pertinent part: "An employee may be subjected to severe disciplinary action and prosecution for intentionally making false or misleading verbal or written statements in matters of official interest. Some of these matters of official interest are: * * * forms which serve as a basis for appointment * * *."

1951, of the Board of Medical Survey, U.S. Naval Hospital, San Diego, California (*ibid.*; see G. Ex. 3):

> [This report] discloses that you were hospitalized on October 17, 1951 for a psychiatric condition. You were retained at the hospital from that time until January 22, 1952 at which time you were discharged from the Naval Service since you were found to be unsuitable for continued service. Upon your admission to the hospital, you repeatedly requested that you be given psychiatric treatment in order "to overcome this terrible dilemma I'm in." The report further indicates that you had been informed of the findings of the Board of Medical Survey. The report also reveals that while under treatment at the hospital, you stated that you had a similar episode approximately one year prior to your enlistment in the Navy. At that time while in college you had found yourself to be depressed and irritable with ideas of suicide.

On June 13, the day after he was notified of the proposed separation, petitioner wrote a letter to the District Director (G. Ex. 1, pp. 6–8) in which he admitted that he had been hospitalized and discharged from the Navy for unsuitability as stated in the specification of charges. He claimed that he had been overworked while serving aboard an aircraft carrier in port in San Diego, as a result of which, he "became exhausted and depressed and could not sleep, and sought medical advice. Since there was no psychiatrist on board, I was then transferred from the ship to the Naval Hospital, at my own request, for examination and whatever disposition might be indicated. At the hospital I was examined and placed under observa-

tion, but not treated in any way. * * * After a few days of adequate sleep and rest I was perfectly well, and was told by the physician in charge of my case that in his opinion I could be returned to shipboard duty, where my depression could recur, but that if I chose he would recommend my honorable discharge from the service for unsuitability. * * *"

In the letter petitioner admitted that he should have answered affirmatively the question whether he had ever been hospitalized for a mental or psychiatric condition. He explained that through an "exercise of poor judgment" he thought a negative answer would be "more correct" because he was under the impression that he was never actually "treated, but merely observed." Petitioner claimed that he had not intended "to conceal information or mislead" and that he had explained the circumstances of his discharge from the Navy during an interview with IRS supervisors prior to his appointment. Although petitioner's letter stated that he had been unaware of the Navy medical report, he did not request an opportunity to examine it.

On June 23, the District Director advised petitioner in writing that he had considered petitioner's response and concluded that the charge had not been refuted and that it warranted his separation (*id.* at 9). The letter notified petitioner that his separation was to take effect on June 26 and that he had a right to appeal to the Civil Service Commission if he believed that his separation had not been effected in accordance with the regulations.

On June 28 petitioner appealed to the New York Regional Director of the Civil Service Commission and requested a hearing (*id. at* 1–2). Petitioner's letter did not allege any failure to comply with the regulations. He contended only that his separation was arbitrary and unjust, relying on the explanation he had previously given to the IRS District Director.

The CSC Regional Director denied petitioner's appeal on July 10 (*id.* at 11–12). His letter advised petitioner that the Commission does not have authority to review the sufficiency of the reasons for separation of a probationary employee nor does it grant a hearing on the employee's appeal.[2] The Regional Director stated that the Commission's review is limited to whether the agency complied with the procedures set out in 5. C.F.R. 315.805,[3] and that a careful review of

---

[2] 5 C.F.R. 752.103(a)(5) excludes probationary employees from the provisions of 5 C.F.R. Part 772, relating to procedures on appeal before the Civil Service Commission. See 5 C.F.R. 772.301(a).

[3] 5 C.F.R. 315.805 (Pet. 3–4) provides that if a probationer's employment is to be terminated for conditions arising before his appointment he is entitled (1) to receive advance written notice "stating the reasons, specifically and in detail, for the proposed action"; (2) to answer the charges and to have the answer considered by the agency; and (3) to receive written notice of the agency's decision.

5 C.F.R. 315.806 details the probationer's appeal rights to the Commission:

> (a) *Right of appeal.* An employee is entitled to appeal to the Commission in writing from the agency's decision to terminate him under § 315.804 [for unsatisfactory performance or conduct] or § 315.805 [for conditions arising before appointment—applicable here] only as provided in this section. The Commission's review does not include any mat-

the record showed that those procedures had been followed:

On July 16, petitioner took a further appeal to the Commission's Board of Appeals and Review, again contending only that his separation was unjustified in the light of his reply to the specification of charges (*id.* at 13–16). Petitioner obtained a copy of the Navy medical report on July 27, but it does not appear that the medical report had been forwarded to the Commission by the IRS. Although petitioner's appeal was still pending, he made no attempt to challenge any statement in the report as inaccurate, nor did he submit the report to the Commission. On August 14, the Board of Appeals and Review affirmed the Regional Director's decision for the reasons which he had stated (*id.* at 20–21).

On November 19, 1964, petitioner filed a complaint in the United States District Court for the District of Columbia seeking reinstatement on the ground that his separation was arbitrary and capricious in that it was not supported by the evidence (*Stilley* v. *Cohen*, Civ. No. 2867–64, D.D.C.). Petitioner subsequently amended his complaint to allege that his separation was procedurally defective in that the IRS failed "to give reasons for the action specifically and in detail." The government moved to dismiss the complaint, or

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ter except as provided in paragraphs (b) [discrimination—inapplicable here] and (c) of this section.

* * * * *

(c) *On improper procedure.* A probationer whose termination is subject to § 315.805 may appeal on the ground that his termination was not effected in accordance with the procedural requirements of that section.

in the alternative, for summary judgment, on the grounds that petitioner could not obtain judicial review of the merits of his separation and that his challenge to the procedural regularity of his separation was barred because he had not presented it on appeal to the Civil Service Commission. On December 17, 1965, the district court, after consideration of the administrative record and the arguments of counsel, dismissed the complaint on the grounds that "(1) * * * the reason for [petitioner's] discharge is reasonable on its face and sufficiently precise as a matter of law"; (2) petitioner was barred from raising the alleged procedural irregularity "which was not raised before the Civil Service Commission, and which in any event is insubstantial"; and (3) the court lacked jurisdiction "to conduct judicial review beyond these two points" (Pet. App. B). On May 27, 1966, the court of appeals affirmed without opinion (Pet. 6), and no petition for a writ of certiorari was filed.

On December 14, 1966, petitioner initiated the present action for back pay in the Court of Claims, contending that his discharge was arbitrary and that the procedural requirements of the regulations had not been followed. The Court of Claims, although stating that summary judgment would have been inappropriate if petitioner had brought his suit initially in that court, granted the government's motion for summary judgment on the ground that petitioner's suit was barred by the adverse judgment of the district court in his prior action for reinstatement (Pet. App. A):

> On consideration of the record before [the district court and the court of appeals], the arguments presented to them, and their orders, we conclude that all the material issues which plaintiff seeks to raise in the present suit have already been determined in the prior action and therefore that plaintiff's claim in this court is barred by collateral estoppel.

ARGUMENT

1. Petitioner's suit for back pay in the Court of Claims rested upon the same cause of action—the alleged illegality of his separation—as his suit for reinstatement in the district court. Contrary to petitioner's contention (Pet. 7), the district court did not refuse to reach the merits of his claim for reinstatement. Its dismissal of the complaint was an adjudication on the merits, based on the court's findings that the grounds for the discharge were reasonable and precise and that the alleged procedural defects were barred under the doctrine of exhaustion of administrative remedies and, in all events, were without merit. The district court correctly held that the scope of judicial review was limited to those issues, see *Keim* v. *United States,* 177 U.S. 290; *Eberlein* v. *United States,* 257 U.S. 82; *Seebach* v. *Cullen,* 338 F. 2d 663 (C.A. 9), certiorari denied, 380 U.S. 972; *Baum* v. *Zuckert,* 342 F. 2d 145 (C.A. 6); cf. *Eustace* v. *Day,* 314 F. 2d 247 (C.A.D.C.), and since the Court of Claims and the district courts have concurrent jurisdiction in civilian back-pay cases (28 U.S.C. 1346 (a)), the same principles of judicial review apply in Court of Claims actions. In the circumstances of

this case, the Court of Claims properly held that petitioner was barred from relitigating issues which had been decided against him by the district court or which could have been raised in the earlier proceeding.

2. Although we believe that the basis of the Court of Claims' decision was correct in view of the posture of this case, petitioner's reliance on *Bennett* v. *United States,* 356 F. 2d 525 (Ct. Cl.), vacated and remanded, 385 U.S. 4, makes it appropriate to point out the material distinctions between the two cases. The petitioner in *Bennett,* a probationary civilian employee of the Navy, was given notice of her proposed separation on the ground that she had failed to disclose, on her security questionnaire, that she had been a member of the International Workers Order; the notice gave the dates of alleged membership, her membership number, and the number of the local (Pet. App. C, p. 13). Mrs. Bennett denied that she had ever been a member of that organization, but the Navy held that her denial did not contradict the information which it had obtained and discharged her. The Court of Claims dismissed her suit for back pay over the dissent of Judge Davis, who believed that, in view of the security implications of the discharge, the Navy had failed to comply with its own regulations in that the employee was not given sufficient information to afford her an opportunity to rebut the charges against her (*id.* at 16, 19–20). In response to the petition for a writ of certiorari, the Solicitor General stated that "the additional documentary evidence upon which the charge was actually based should have been made

available to petitioner in order to remove any doubt as to her ability to meet the charges against her with more specificity than the submission of a general denial," and suggested that the judgment of the Court of Claims should be vacated and the cause remanded (*id.* at 18)— a course which this Court followed.

The specification of charges in the present case, on the other hand, was far more detailed, and satisfied the requirement that a probationary employee must be advised "specifically and in detail" of the reasons for the proposed action (5 C.F.R. 315.805). It stated the dates, place, and cause of petitioner's hospitalization; the fact that petitioner had consequently been discharged as unsuitable for military service; and statements which petitioner had made during his hospitalization. Petitioner's lengthy reply dispels any notion that he was unfamiliar with the basis of the charge. Moreover in *Bennett,* the plaintiff had denied the critical fact in issue—whether she had been a member of the organization—and the additional information was vital to enable her to refute in detail the charge against her. Petitioner, on the other hand, admitted that he had been hospitalized for a condition that required the services of a psychiatrist and that he had been discharged from the Navy because of an emotional problem. His only defense to the charge was that his failure to disclose those facts, which he admitted was an error, was not intentionally false or misleading because he believed that the questionnaire did not call for such information.

Petitioner was charged with violating a regulation designed to ensure that the Internal Revenue Service

may confidently rely on the trustworthiness of its employees in the performance of their sensitive duties. Petitioner's response to the charge showed that he elected not to reveal facts which would have been material to the decision to employ him. Disclosure of the Navy medical report to petitioner would not have enabled him to refute the fact, which he admitted, that he had intentionally omitted all reference to his hospitalization on his appointment questionnaire. Presumably petitioner would have attempted, as he did during subsequent stages of the litigation, to contradict certain statements in the specification of charges. But even if petitioner's version of his hospitalization were accepted, the Internal Revenue Service was entitled to find that petitioner's concealment of material facts because of a hypertechnical interpretation of the questionnaire did not satisfy the standards which its employees must maintain.[4]

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[4] Similarly, the failure to forward the medical report to the Civil Service Commission did not affect petitioner's rights. As noted above (pp. 5–6 & n. 3, *supra*), the Commission's review is limited to whether the agency followed the required procedures. Whether petitioner was given sufficiently detailed notice of the charge is to be determined from the notice and specification. The Commission correctly held that the regulation had been complied with, and petitioner did not allege that he was prejudiced by the failure to disclose the report to him. Since the Commission did not have jurisdiction to review the merits of petitioner's separation, examination of the contents of the report would not have been pertinent to the Commission's inquiry.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

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